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Supreme Court of the United States

No. 170

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 170.

JAMES W. JOHNSON, formerly Collector of Internal Revenue for the Third District of New York, and BRUCE E. LAMBERT, Acting Collector of Internal Revenue for the Third District of New York,

Petitioners,

v.

JOHN FOSTER DULLES, EDWARD H. GREEN and EUSTACE SELIGMAN, as and only as Executors of the Last Will and Testament of William Nelson Cromwell, deceased,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

We agree with the Solicitor General that "this case presents neither a direct conflict nor an issue of major fiscal importance" and that by itself this case does not warrant further review by this Court (Pet. p. 6).

This case turned in the courts below upon the application of well-settled legal principles to the undisputed and stipulated facts concerning the organization and operation of The Association of the Bar of the City of New York, New York County Lawyers' Association and The New York State Bar Association in 1948, the year of Mr. Cromwell's death.*

* The stipulation of facts relating to the bar associations upon which the case was tried consisted of 164 legal size printed pages (1R3-166).

In view of the factual nature of this case, we deem it important to comment upon the truncated statement of facts set forth in the petition (pp. 3-5).

As the Court of Appeals noted, the substantial activities of the bar associations were (App. 18):

> (1) maintaining libraries for legal research,
>
> (2) sponsoring lectures and forums on the law,
>
> (3) providing free legal service through participation in legal aid, and
>
> (4) providing low cost legal service through participation in a legal referral system.

These activities were held to be educational or charitable or both.

The Court of Appeals also reviewed at some length the activities of the bar associations in the regulation of the unauthorized practice of law and the disciplining of the legal profession as authorized and expected under State law, improving court procedure and endorsement of judicial candidates, and recommendations made by the bar associations with respect to pending legislation (App. 13-17). These activities were the subject of special attention by the Court of Appeals because they were emphasized by the district court in holding that the bar associations did not qualify under Section 812(d) of the Internal Revenue Code of 1939.

The Court of Appeals held that three of these activities—regulation of the unauthorized practice of law, disciplining of the legal profession, improving court procedure and endorsement of judicial candidates, were charitable activities and specifically noted that each of these activities benefited the public and had not been undertaken by the bar associations for a selfish purpose (App. 13-16).

The Court of Appeals concluded with respect to the activities of the bar associations relating to legislation that "These activities serve no selfish purpose of the legal profession—rather they constitute an expert's effort to improve the law in technical and noncontroversial areas" (App. 17). The Court of Appeals also noted that "approval of or opposition to proposed legislation constitutes but a small portion of the total activity of the associations" (App. 17).

We disagree with the Solicitor General's view that the Court of Appeals erred in its holding that the bar associations qualified as organizations coming within Section 812(d) of the Internal Revenue Code of 1939. He presents no argument; he simply cites cases in support of his view. A brief examination of these cases not only confirms his ultimate conclusion that this case presents no conflict with the decided cases but also underscores the factual nature of cases of this character.

In *Better Business Bureau* v. *United States*, 326 U. S. 279, this Court found "[a] commercial hue permeating petitioner's organization" which was reflected in its purpose "to promote the mutual welfare, protection and improvement of business methods among merchants and its efforts to cleanse the business system of dishonest practices in order that merchants might successfully and profitably conduct their business. The Court expressly found it unnecessary to determine whether the Better Business Bureau was educational in character, stating (326 U. S. at 282):

> "It thus becomes unnecessary to determine the correctness of the educational characterization of petitioner's operations, it being apparent beyond dispute that an important, if not the primary, pur-

> suit of petitioner's organization is to promote not only an ethical but also a profitable business community. The exemption is therefore unavailable to petitioner."

In *Slee* v. *Commissioner*, 42 F. 2d 184 (2 Cir.), gifts made to the American Birth Control League were held not deductible for Federal income tax purposes. The League had a distinct legislative aim: "agitating for the repeal of laws preventing birth control" (42 F. 2d at 185).

In *Vanderbilt* v. *Commissioner*, 93 F. 2d 360 (1 Cir.), a bequest to National Woman's Party was held not to be deductible for estate tax purposes. National Woman's Party sought equal rights for women and engaged in procuring the enactment and repeal of laws, the drafting of bills and the furnishing of facts and information in their support. On at least 100 occasions National Woman's Party was successful in obtaining legislation to carry out its aims.

In *United States* v. *Community Services*, 189 F. 2d 421 (4 Cir.), certiorari denied 342 U. S. 932, exemption under the Federal Insurance Contributions Act was denied to a corporation which was organized and operated for two purposes: (1) to engage in commercial business for profit, and (2) to turn over the profits realized from its commercial activities to charitable organizations. The court concluded that while the second purpose was charitable, the first purpose was clearly not charitable and, accordingly, the corporation was not entitled to charitable status.[5]

We also agree with the Solicitor General that there is no conflict between this case and *League of Women Voters*

[5] *Community Services* was not cited by petitioners in their brief in the Court of Appeals

of U. S. v. United States, 180 F. Supp. 379 (Ct. Cl.), in which a petition for certiorari is now pending in this Court (October Term, 1960, No. 199). In the *League of Women Voters* case, the majority of the Court of Claims concluded that:

> ". . . instead of its being an unsubstantial and insignificant part of the League's activities, the influencing of legislation is the League's main purpose and reason for being." (180 F. Supp. at 383)

The prevailing opinion in the Court of Claims points out that the League of Women Voters frequently took partisan positions on controversial issues such as the repeal of the tax on margarine and the adoption of the North Atlantic Pact and that the League did what it could to influence those in authority to adopt the positions which the League itself advocated. The majority of the Court of Claims noted 22 separate instances of direct communication by the League to persons in positions of authority with regard to legislation.

This is in sharp contrast with the instant case where the bulk of the activities of the bar associations were not aimed at and had nothing to do with legislation. In this case, the bar associations' work in relation to legislation has been small in relation to total activities and has been "expressed in expert reports on matters uniquely within the fields of experts and has avoided questions which are outside those fields, i.e., questions which turn largely on economic or political decisions" (App. 16-17).

Neither this case nor the *League of Women Voters* case is in conflict with *Seasongood v. C. I. R.*, 227 F. 2d 907 (6 Cir.), where over 95% of the activities of the Hamilton County Government League whose status was there in question had no relationship to legislation.

The problem in all of these cases is really one of applying the statutory language to the facts on a case by case basis. This Court is in no better a position to lay down broad governing rules for all cases in this field than it is to lay down such rules in determining what is a "gift" for income tax purposes. See *Commissioner* v. *Duberstein*, decided by this Court on June 13, 1960. In both classes of cases, the question is "basically one of fact, for determination on a case-by-case basis".

In view of the foregoing, we submit that it would not be appropriate for certiorari to be granted in this case, even if it were granted in the *League of Women Voters* case. Since this Court will not grant certiorari merely to review the correctness of the decision below, certiorari should be denied.

Respectfully submitted,

NORRIS DARRELL,
Attorney for Respondents,
48 Wall Street,
New York 5, N. Y.

SULLIVAN & CROMWELL,
HENRY N. ESS, III,
Of Counsel.

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